

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2024

To be argued by

KATHERINE K. HUDSON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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United States ex rel. Perry Ford, :

Petitioner-Appellee, :

-against- :

: Docket No. 77-2024

Jack R. Czarnetzky, Superintendent, :
Eastern New York Correctional Facility, :

Respondent-Appellant. :
-----X

Appeal from the Grant of a Writ of
Habeas Corpus by the United States
District Court for the Southern
District of New York.

BRIEF FOR PETITIONER-APPELLEE

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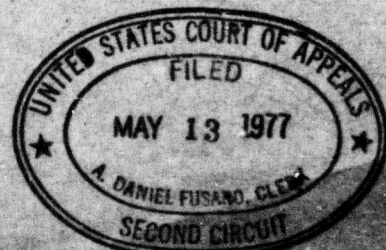


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BRIEF FOR PETITIONER-APPELLEE

QUESTION PRESENTED

1. Whether the factual determination of the District Court that petitioner did not know and was not advised of the sentencing consequences of his plea was clearly erroneous.

2. Whether the factual determination of the District Court that knowledge of the actual sentencing possibilities would have made a difference to petitioner in his decision to enter a plea was clearly erroneous.

3. Whether the District Court abused its discretion in granting relief in the form of vacation of the invalid plea.

STATEMENT OF THE CASE

Preliminary Statement

By petition filed April 15, 1976, petitioner, an inmate of the Eastern New York Correctional Facility, Napanoch, New York, moved the United States District Court for the Southern District of New York for a Writ of Habeas Corpus, pursuant to Title 28, United States Code, Sections 2241 and 2254. The grounds of the petition were that petitioner's conviction was obtained in violation of the constitutional requirement that a guilty plea be entered with a full understanding of its direct consequences. Specifically, petitioner's pleas to two indictments in the Bronx County Supreme Court, State of New York, on September 17, 1968, were entered without knowledge of the minimum or maximum sentences which he could receive as a result of these pleas.

On May 13, 1976, the District Court granted petitioner's application for leave to proceed in forma pauperis, pursuant to the provisions of 28 U.S.C. §1915(a).

An evidentiary hearing was held before the Honorable Henry F. Werker, United States District Judge, on December 19, 1976. Based on the testimony adduced at that hearing, the District Court determined that the petitioner was ignorant of

the consequences of his plea and that his ignorance had an impact on his decision to enter a plea. Therefore, on January 27, 1977, Judge Werker granted petitioner's application for a Writ of Habeas Corpus, directing that the pleas and sentences be vacated and that the case be remanded to the Supreme Court of the State of New York, Bronx County, for disposition within 120 days. Respondent appeals from that decision.

It is the position of the petitioner that the sole issue raised on appeal is the validity of the factual determinations made by the District Court subsequent to hearing the testimony of both the petitioner and his court-appointed attorney at the time of the pleas. Judge Werker's findings of facts and conclusions of law, based on his assessments of the credibility of these witnesses, are embodied in his opinion of January 27, 1977. It is petitioner's contention that these findings are not "clearly erroneous," judged in accordance with the standard set forth by this Court in Caputo v. Henderson, 541 F.2d 976, 981 (2d Cir. 1976)-- "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted.)

Statement of Facts

A. The Trial

In December 1968 the petitioner, Perry Ford, age 19, was arrested and incarcerated as a result of a pending indictment in Bronx County which charged him with the assault of Nathan Goodman. (Indictment 189/69.) This indictment arose out of an incident alleged to have occurred in September 1968, for which petitioner was initially arrested on October 7, 1968. This case was ultimately dismissed in Bronx Criminal Court, but on December 12, 1968, an indictment was returned based on the same allegations. Prior to his arrest in December 1968, petitioner's entire adult criminal record consisted of the aforementioned arrest in October. (Exhibit 4, Appendix to Petitioner's Memorandum of Law, submitted to the District Court.)

While petitioner was incarcerated, three further indictments were obtained against him. He was charged with the homicide of Ronald Quintana in a one-count murder indictment. (Indictment 186/69, Exhibit 3, Appendix to Petitioner's Memorandum of Law, submitted to the District Court.) In addition he was charged with having acted in concert in the

homicide of Nicholas Chambers (Indictment 187/69)* and with having acted in concert in the robbery of William VanHook. (Indictment 188/69.)

The Quintana indictment, the first matter to reach trial, began with jury selection on September 11, 1969.

(A. 16.) Prior to the commencement of this trial the petitioner had spoken with his assigned counsel, Noah Braunstein, on one occasion at Rikers Island. (A. 121-22.) During the trial the Assistant District Attorney, Mr. Goldsmith, produced six witnesses, whom he later represented to be all State's witnesses. (A. 12.)

Of the six witnesses who testified, only two connected the defendant to the Quintana homicide, a Bernadette Combs and Judy Ringer. (A. 50-53.) Following their cross-examination by Mr. Braunstein on September 16, 1969, both Combs and Ringer were arrested and charged with perjury. (Exhibits 1 and 2, Appendix to Petitioner's Memorandum of Law, submitted to the District Court.) On September 17, 1969, the Assistant District Attorney, Mr. Goldsmith, informed Mr. Braunstein of their arrests and of his intention to recall Combs and Ringer who wished to recant and return to their direct testimony. This

* Petitioner was severed from the Chambers case, on the motion of Assistant District Attorney Goldsmith, on November 24, 1969. The matter did not proceed to trial until December 1969. (A. 90-91, A. 131-32.)

conversation occurred off the record. (A. 59-63.)

In another off the record conversation Mr. Braunstein informed Mr. Goldsmith and Justice Bloustein of his intention to object to a recall of Combs and Ringer, and to make his objection known to the jury, in addition to apprising the jury of the arrests for perjury of the previous evening. Justice Bloustein warned Mr. Braunstein not to so inform the jury and ordered him out of the robing room, while Justice Bloustein and Mr. Goldsmith remained therein. At this time, Mr. Burton Roberts, the District Attorney for the Bronx, entered into Justice Bloustein's chambers with Mr. Braunstein remaining outside. When Mr. Roberts exited the judge's chambers, he approached Mr. Braunstein and said, "How about taking a plea in this case." (A. 60-64.)

B. Plea Discussions

Prior to Mr. Robert's initiation of plea discussions, the petitioner had not indicated any desire to plead guilty. (A. 61, 101.) The petitioner testified that he desired to continue the trial and not to plead guilty. (A. 111-112.) As of September 17, 1969, Mr. Braunstein testified that he never discussed with the petitioner the maximum sentence permitted by statute for manslaughter in the first degree, nor had he discussed any other lesser included offense of murder

since the indictment only charged murder and the case had proceeded to trial rather than plea. (A. 103-104.)

The following colloquy transpired between Mr. Roberts and Mr. Braunstein, subsequent to Mr. Braunstein's having been ordered out of the robing room.

MR. BRAUNSTEIN: He said, "How about taking a plea in this case?"

Mr. Goldsmith wasn't in there yet.

I said, "Well, what have you got to offer?"

He says, "How about manslaughter 1?"

I says, without talking to the defendant, "I would recommend manslaughter 2."

He says, "Look, you know I just became the D.A., you have got to make me look good." He says, "What's the difference of a label?"

I said, "No, I want manslaughter 2 because the limit on manslaughter 2 is fifteen years." I said, "But I'll make you look good." I says, "I'll take a plea for this defendant, after I talk to the defendant, for one of the robbery indictments and that the sentence in that case is to run concurrent with the sentence in the manslaughter case, and that in addition to that I want a statement from Mr. Goldsmith that with respect to the other indictments their disposition will be made at that time."

(A. 65-66.)

MR. MIRSKY: Let me take you back.

Did Mr. Roberts agree to having you plead to manslaughter 2 in addition to the robbery count in full satisfaction of all the indictments?

MR. BRAUNSTEIN: No. He said, "You must take a plea to manslaughter 1."

MR. MIRSKY: Did you say anything to him relative to that?

(A. 67.)

MR. BRAUNSTEIN: I said I would have to talk to the defendant.

MR. MIRSKY: Did you say anything to him relative to your desire to plead to manslaughter 2 and the reasons for that?

MR. BRAUNSTEIN: Well, I told him that the only reason I wanted to plead guilty to manslaughter 2, because labels meant nothing to me, but it was because the indeterminate sentence on manslaughter 2 was 15 years, an indeterminate sentence on manslaughter 1 was a longer period of time. It think it may have been 25 years.

MR. MIRSKY: Yes.

MR. BRAUNSTEIN: And so I then discussed it with the mother--you want me to proceed?

MR. MIRSKY: I wanted you to tell us what, if anything, Mr. Roberts said to you relative to the 15 years.

MR. BRAUNSTEIN: Well, Mr. Roberts said to me, "Whether he takes the plea--if he takes the plea for manslaughter 1 he won't do more than 15 years."

MR. MIRSKY: These were his words to you?

MR. BRAUNSTEIN: That's right.

MR. MIRSKY: And so what did you then say to him relative to the label of manslaughter 1 as opposed to manslaughter 2?

MR. BRAUNSTEIN: Well, I said, "Not in the nature of time off for good behavior or the rules of the Parole Board that he won't do more than 15 years." I says, "I want to be sure that the sentence on manslaughter 1 will be the same in the bottom line that would have been the limit on manslaughter 2."

MR. MIRSKY: What did ye say to you relative to that?

MR. BRAUNSTEIN: He said okay on that.

(A. 68-69.)

The District Attorney wanted a plea to manslaughter in the first degree, but was willing to limit the petitioner's sentence exposure to 15 years, or the maximum sentence under manslaughter in the second degree. Mr. Braunstein testified that he knew from experience with Mr. Roberts when he was an assistant district attorney in New York County that he could rely on his recommendation. (A. 70.)

Subsequent to speaking with Mr. Roberts, Mr. Braunstein spoke with the petitioner. He testified to having informed the petitioner of the plea to manslaughter in the first degree to run concurrent with a plea to robbery in the first degree, and that in return the other pending indictments would be dismissed. Mr. Braunstein recalled the petitioner having asked "What am I going to get" and having responded "Fifteen years is what you are going to get." (A. 71-72.) Braunstein further recalled that the petitioner appeared hesitant about the taking of a plea and wished to speak to his mother.

Following this initial plea discussion with the petitioner, Mr. Braunstein again spoke with the court and with Assistant District Attorney Goldsmith in the robing room.

The latter informed the court of the agreement between Mr. Roberts and Mr. Braunstein and stated that he would recommend to the court, in his statement of recommendation to accept the plea, a time to be served of not more than 15 years. (A. 73-74.) Justice Bloustein stated that if the probation report indicated that the petitioner was a proper person, he would not exceed the 15 years. (A. 75.)

On the basis of these discussions, Mr. Braunstein concluded that a recommendation by the District Attorney, coupled with Justice Bloustein's statement, would be honored. (A. 78.) Upon reaching this understanding with Mr. Goldsmith and Justice Bloustein, Mr. Braunstein again spoke to the petitioner. At this point Mr. Braunstein was persuaded that he had achieved the "bottom line" in his negotiations, a maximum possible sentence of 15 years, which was the sentence exposure for manslaughter in the second degree. Therefore, Mr. Braunstein informed the petitioner that the maximum sentence he would receive for the plea to manslaughter in the first degree was not more than 15 years. (A. 76-77.) In addition Mr. Braunstein testified to again informing the petitioner that the robbery plea would run concurrent with the manslaughter sentence, and that the other indictments would be dismissed.

Mr. Braunstein asserted that he never informed the petitioner he could receive a sentence in excess of 15 years

for either the manslaughter or the robbery plea. (A. 77-78.) In addition, Mr. Braunstein indicated that he never made known to the petitioner the maximum sentence provided by statute for the manslaughter or robbery pleas. Having achieved the "bottom-line" in the plea negotiations, he had "no occasion" to refer to statutory maximums in his discussions with the petitioner. (A. 104-107.)

The petitioner testified Mr. Braunstein stated to him that the maximum time for the plea to manslaughter in the first degree was fifteen years and that in return all other indictments would be dismissed. The petitioner indicated that Mr. Braunstein never advised him the maximum sentence permitted by statute for a plea to manslaughter in the first degree could exceed 15 years. (A. 111-115.) In addition the petitioner stated that he had no knowledge of the maximum sentence for either manslaughter or murder independent of his discussions with Mr. Braunstein. (A. 135, 138.) Finally, the petitioner testified that had Mr. Braunstein advised him that he could get up to 25 years for the plea to manslaughter in the first degree, he would not have taken the plea. (A. 127-128.)

C. The Plea

The petitioner testified that he did not know of the robbery plea until it was offered by Mr. Blaustein in open court, at which time a conference was held between the petitioner and Mr. Braunstein. The petitioner testified that during this conference, Mr. Braunstein advised him that the robbery plea would run concurrent with the sentence on the manslaughter plea, without disclosing the maximum possible sentence for the robbery plea. (A. 118-120, A.32.)

Furthermore, the petitioner testified that although Mr. Braunstein had advised him of the package plea which had been offered by the district attorney with the knowledge of the judge, he was not to mention any commitments during the taking of the plea. (A. 116, A. 126-27.) Mr. Braunstein also testified to having so advised the petitioner not to refer to any promises. (A. 80.)

During the taking of the plea, Justice Bloustein did not inform the petitioner of the maximum possible sentence provided by statute for manslaughter in the first degree or robbery in the first degree, nor did he question the petitioner as to his knowledge and understanding of the consequences of his plea. Mr. Goldsmith failed to recommend that the sentence not exceed 15 years, and Mr. Braunstein omitted any reference to prior discussions regarding a maximum sentence

of 15 years. Although Mr. Braunstein asked the court to consider imposing concurrent sentences, he failed to insist that concurrent time be a condition of the plea. (A. 24.)

D. Attempts to Withdraw the Plea

Subsequent to the plea, the petitioner was interviewed by the probation department, prior to his return to court on October 31, 1969. The petitioner asked the probation officer whether he could receive Youthful Offender Treatment, since he was under age 21. The probation officer advised the petitioner that he could receive 25 years consecutively for the manslaughter and the robbery pleas, whereupon petitioner, asserting his innocence, indicated an immediate desire to plead not guilty to all the indictments. (A. 120-23.)

The petitioner did not see Mr. Braunstein until his return to court on October 31, 1969, at which time the court made the petitioner aware of the probation report indicating petitioner's desire to withdraw the guilty pleas and stand trial on all the indictments. The petitioner confirmed his desire to withdraw both pleas and the matter was adjourned until November 14, 1969. (A. 18-19.) On November 14, the petitioner reaffirmed his desire to withdraw his plea, indicating that he had not understood the proceedings at the time he entered his guilty pleas. Justice Bloustein adjourned

the matter for a Beasley hearing* to determine the merits of petitioner's claim. (Minutes of Second Attempt to Withdraw Plea, November 14, 1969, p. 2, Appendix to Petitioner's Memorandum submitted to the District Court.)

Sometime after December 10, 1969, Mr. Braunstein arranged to see Justice Bloustein who informed Mr. Braunstein that if the petitioner persisted in attempting to withdraw the plea he would be compelled "to add more time onto his 15 years." (A. 82-83.) In addition, Justice Bloustein stated to Mr. Braunstein that although he would afford the petitioner a Beasley hearing, "I am still going to deny it [the withdrawal of the plea] because I don't think there's enough basis for it." (A. 82.) Mr. Braunstein indicated to Justice Bloustein that additional time was not within "the purview of the mind of the defendant" who anticipated a maximum of 15 years, but then asserted that he would remain mute in any further proceedings. (A. 83.) Mr. Braunstein testified that he "didn't want to have any part of it because I hoped to have enough health and strength to continue to practice law before Judge Bloustein and other judges of that court

* In People v. Beasley, 25 N.Y.2d 483 (1969), the New York Court of Appeals determined that a hearing must be conducted when the trial court has made insufficient inquiries at the time of plea regarding the defendant's understanding of the nature of the charges and the consequences of the plea.

and to come up against some of the other district attorneys in that courthouse." (A. 85.)

At the Beasley hearing on February 9, 1970, before Justice Bloustein, the petitioner testified that Mr. Braunstein told him the maximum sentence for the plea to manslaughter in the first degree was fifteen years, with the robbery sentence to run concurrent. (A. 7.) The petitioner testified further that he had been told by Mr. Braunstein not to refer to any plea discussions or promises. Mr. Braunstein did not testify and Mr. Goldsmith never acknowledged having made a commitment to recommend no more than 15 years. Justice Bloustein did not refer to any prior conversations held in his presence between Mr. Braunstein and Mr. Goldsmith. (A. 6-9.) In addition the petitioner was denied the opportunity to call witnesses on his own behalf. (A. 7, A. 10.)

During the course of the Beasley hearing, the court made no inquiry into the petitioner's knowledge, at the time of his plea, of the possible minimum or maximum sentences which he could receive, nor did the court hear any testimony to contradict that of the petitioner as to his understanding of fifteen years. Nevertheless, at the conclusion of the hearing, Justice Bloustein determined that the petitioner had pleaded guilty "intelligently, understandingly, with knowledge of the consequences that would flow therefrom and

meaningfully" (A. 34), and sentenced him to an indeterminate term of imprisonment at Sing Sing Prison not to exceed 20 years. (A. 40.) Because the court was mistaken as to the petitioner's age at the time of sentence, Justice Bloustein was required to resentence him to Elmira on February 11, 1970.

E. Post-Conviction Proceedings

Subsequent to his sentence, petitioner moved in May 1971, pro se, for a Writ of Coram Nobis on the grounds that the initial hearing to determine the voluntariness of his plea was inadequate and constituted a violation of his due process rights. That motion was denied on June 11, 1971, on the basis that the propriety of the trial court's determination was reviewable in petitioner's pending direct appeal.

Notice of Appeal having been duly filed on March 6, 1970, petitioner initially proceeded pro se and filed a brief with the Appellate Division in the fall of 1971. The brief raised the issue of the knowing and voluntary quality of the plea, as well as the inadequacy of the Beasley hearing which failed to explore or permit the defendant to fully present his allegations concerning misinformation and coercion.

In January 1972 the Appellate Division appointed Robert Kasanof of the Legal Aid Society as counsel on appeal.

The Legal Aid Society brief on appeal, submitted in December 1973, addressed itself solely to the issue of coercion and the abuse of discretion inherent in the court's denial of petitioner's application to withdraw his plea, given petitioner's unrefuted allegations. On February 15, 1973, the Appellate Division, First Department, unanimously affirmed the conviction, without opinion. Leave to appeal to the New York Court of Appeals was denied on April 9, 1973.

In February 1976, the petitioner submitted a coram nobis petition pursuant to Section 440.10 of the New York Criminal Procedure Law. This petition, based on the petitioner's contention that he was never informed of the maximum possible sentence that could be imposed, rendering his pleas unknowing and involuntary, was denied by Judge Bloustein, without a hearing and without opinion. Petitioner's motion for leave to appeal this order to the Appellate Division, First Department was denied on March 23, 1976.

Petitioner then filed the application for a Writ of Habeas Corpus which was granted by the District Court in its opinion of January 27, 1977.

F. The Opinion of the District Court

In its opinion, the District Court made certain specific and detailed findings of fact, upon which its

conclusions of law were based. As to whether the petitioner had knowledge of the actual sentencing possibilities at the time of his guilty plea, the Court found that the petitioner was not informed by his counsel, the court or any other inmate of the maximum and minimum term for manslaughter in the first degree or for robbery in the first degree. Other than the District Attorney's recommendation of fifteen years, no promise was ever made. In addition, the Court found that, although he might have been a street-wise youngster, he had only one prior arrest and could not be charged with knowledge of the penalties for the varying degrees of crime set out in the Penal Law. (A. 144.) As to whether the petitioner's decision to plead guilty was affected by this lack of knowledge, the Court considered the objective circumstances surrounding the entry of the plea. The Court found that the only two witnesses who connected petitioner with the crime with which he was charged apparently recanted on cross-examination and were arrested for perjury by the Assistant District Attorney. Plea negotiations between the District Attorney, Burton Roberts, and defense counsel were initiated after these developments. In addition, the Court found that the petitioner was apparently not anxious to take a plea and that he subsequently decided to withdraw his pleas during an interview with a probation officer, prior to the time of sentence.

Finally, the Court found that the petitioner was denied the right to call certain witnesses to support the claims which he advanced at the Beasley hearing. (A. 143.) Based on these facts, the Court concluded that the likelihood of conviction was not such that the petitioner felt that a guilty verdict was a certainty and therefore that a harsher penalty was sure to be imposed than whatever penalty would follow the entry of the plea. (A. 144.)

In light of these factual determinations, the court, applying the test for determining the constitutional validity of state court guilty pleas set forth in Kelleher v. Henderson, 531 F.2d 78 (2d Cir. 1976), reached its conclusions of law. Judge Werker concluded that the failure to advise the petitioner of the maximum and minimum sentences which could be imposed upon entry of his pleas rendered his plea unknowing and therefore constitutionally invalid. (A. 144.)

ARGUMENT

Introduction

The legal standard which this Circuit has adopted for the purposes of evaluating the constitutional validity of a state court guilty plea was first explicitly enunciated in this Court's decision in Kelleher v. Henderson, supra. Rejecting petitioner's contention that his ignorance of the maximum possible sentence required vacation of his plea, the Court held:

the determination of constitutional voluntariness must be based not only on whether required advice was omitted . . . , but also on whether it would have made any difference, if given.

531 F.2d at 82.

The decision in Kelleher affirmed the application of this dual inquiry by the District Court (Werker, J.). In his memorandum opinion, Judge Werker concluded that although the petitioner had never been informed of the maximum and minimum sentences which he faced, weighing all the circumstances the Court was not persuaded that his lack of knowledge affected his ability to make an intelligent decision. The opinion cited Jones v. United States, 440 F.2d 466 (2d Cir. 1971) and United States v. Walton, 439 F.2d 824 (2d Cir.), cert. denied, 404 U.S. 859 (1971), cases which

stand for the importance of assessing the impact of a lack of knowledge on the petitioner's plea decision, before determining if vacation of the plea is constitutionally required.

It would be incredible to conclude that the author of the Kelleher opinion in the District Court, the opinion which fixed the dual inquiry as the appropriate test for this Circuit, would apply the wrong legal standard in the instant case. Not only does Judge Werker cite and distinguish the Kelleher case in his decision now before this Court, he clearly conducts a Kelleher inquiry. Beyond exploring the extent of the petitioner's knowledge of the sentence consequences of his plea, the Court renders findings of facts which specifically relate to the strength of the prosecution's case and the certainty of conviction: the recantation of the key prosecution witnesses and the initiation of plea discussions shortly thereafter. (A. 143.) Judge Werker concludes that, in direct contrast to the factual situation in Kelleher, the likelihood of conviction was not overwhelming and the petitioner himself did not feel that a guilty verdict was a certainty. Based on these factual findings and conclusions, the Court held that the petitioner's plea was constitutionally invalid.

In distinguishing this case from Kelleher and in granting this petitioner his application for a Writ, Judge

Werker must necessarily have determined that the maximum and minimum sentences to which the petitioner was exposed were a serious consideration which would have affected his decision to plead, had he been adequately informed. This determination entailed the application of the dual inquiry mandated by Kelleher v. Henderson, supra, and reaffirmed by Caputo v. Henderson, 541 F.2d 972 (1976) as the correct legal standard for assessing the constitutional validity of state guilty pleas.

POINT I

THE DISTRICT COURT'S FACTUAL DETERMINATIONS ARE AMPLY SUPPORTED BY THE RECORD AND ARE NOT CLEARLY ERRONEOUS

In that the District Court did apply the correct legal standard in reaching its decision to grant the petitioner's Writ, the sole issue raised on review is whether the Court's findings of fact meet the test of Rule 52, Federal Rules of Civil Procedure. United States v. Pfingst, 490 F.2d 262, 264 (2d Cir. 1973); United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972). Rule 52 prescribes that factual determinations made by the hearing court, in actions tried without a jury, "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial

court to judge of the credibility of the witnesses." Rule 52(a), F.R.Civ.P. This Court in United States v. Pfingst, supra, noted specifically that "substantial weight" must be accorded the findings of fact below where "an evaluation of the credibility of the witnesses who testified before the district judge was of fundamental importance in the resolution of conflicting testimony." 490 F.2d at 273. The credibility of witnesses is clearly a critical factor in the District Court's determinations in the instant case, particularly as the nature of the petitioner's understanding of sentencing consequences at the time of his plea have never before been ascertained or spread upon the record.

In addition, in evaluating the impact of the failure to inform the petitioner of the maximum which he faced, the court in Caputo v. Henderson, 541 F.2d at 984, emphasized that "[f]indings which relate to such intangibles as motivation and intent depend especially upon the credibility assessments made by those who see and hear the witnesses," citing United States v. Yellow Cab Co., 338 U.S. 338 (1949) and United States v. Pfingst, supra.

Respondent asks this Court to re-weigh the evidence and re-evaluate findings of fact as to both of the key determinations made below--that this petitioner had no knowledge of the maximum and minimum sentences which attached to his

plea and that this knowledge would have affected his decision to enter a plea. This request is, in essence, a request for a hearing de novo on the record. The United States Supreme Court in United States v. Yellow Cab Co., 338 U.S. 338 (1949), rejected just such a request for a comprehensive review of a trial court's findings of fact, indicating that "Rule 52 applies to appeals by the Government as well as to those by other litigants." 338 U.S. at 341.

Even if this Court should find that there is some evidence in the record which could arguably support respondent's position, such a showing by respondent is insufficient to require a reversal of the findings reached by the District Court. As the Supreme Court made explicit in both United States v. Yellow Cab, supra, and United States v. Gypsum Co., 333 U.S. 364 (1947), a finding is not clearly erroneous "where the evidence would support a conclusion either way but where the trial court has decided to weigh more heavily for the defendants," 338 U.S. at 342, but only where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395..

Finally respondent argues that the District Court failed to give due consideration to the state court determinations which related to the knowing and voluntary quality of

petitioner's pleas, citing 28 U.S.C. §2254 (d)(8). However, according to the provisions of 28 U.S.C. 2254 (d), the presumption of correctness does not attach to state factual determinations where, among other exceptions

(1) . . . the merits of the factual dispute were not resolved in the state court hearing;

(3) . . . the material facts were not adequately developed at the state court hearing;

(6) . . . the applicant did not receive a full, fair, and adequate hearing in the state court proceeding.

The District Court held that the petitioner was entitled to call witnesses at the Beasley hearing, the first state court review of the validity of his guilty pleas.

(A. 144.) The trial court (Bloustein, J.) denied petitioner the opportunity to summon witnesses, despite his repeated assertions that they were essential to the fair presentation of his claims. (A. 7, 10, 14, 36.) Furthermore, Mr. Braunstein, petitioner's counsel, failed to testify, apparently because he did not wish to alienate the Judge and district attorneys involved by placing their plea negotiations on the record. (A. 85.) In addition to these deficiencies, the petitioner's claims and the court's inquiry at the Beasley hearing were directed toward the voluntariness of petitioner's pleas. Neither the court nor defense counsel questioned the petitioner at the Beasley hearing as to his understanding

of the sentencing consequences of his pleas, although petitioner himself did testify to his understanding of no more than fifteen years. (A. 7.)

Ironically, in light of the trial court's failure, both at the time of the plea and at the Beasley hearing, to inform the petitioner of the possible sentences which he faced or to inquire into the nature of his understanding in this area, Justice Bloustein denied petitioner's coram nobis application, founded on the contention that he was not informed of the sentence possibilities, because petitioner's contention lacked documentary support. This coram nobis application, denied by the trial court without a hearing beyond that afforded by the defective Beasley hearing, constitutes the only other state review of petitioner's claims herein.

As the state court fact finding procedures neither afforded the petitioner a full and fair hearing nor adequately developed or fully resolved the merits of the factual dispute, the District Court was statutorily authorized to reconsider the merits and make factual determinations of its own, in light of both the record and the testimony presented at the evidentiary hearing.

A. The District Court Was Correct in Finding that the Petitioner Did Not Know and Was Not Advised of the Sentencing Consequences of His Plea

This Circuit has determined that, to have a full understanding of the consequences of a plea, a defendant must be aware of the maximum possible penalties for the offense to which he is pleading, although such a lack of understanding may not always require vacation of state court guilty pleas. Caputo v. Henderson, supra at 982; United States ex rel. Hill v. Ternullo, 510 F.2d 844, 847 (2d Cir. 1975); United States ex rel. Leeson v. Damon, 496 F.2d 718, 721 (2d Cir. 1974). This court has consistently held that awareness of an approximate sentencing range does not fulfill the requirement of an understanding of the law with regard to sentencing consequences. Although the petitioner in Kelleher v. Henderson, supra, knew that he faced a sentence of at least six to eighteen years because of a prior plea offer, although he was informed by the trial judge at the time of his plea that he faced a very "stiff sentence," and although he ultimately received a sentence of a minimum of seven to a maximum of twenty-one years, the District Court determined that the petitioner lacked knowledge of the maximum term of twenty-five years to which he was exposed by his plea. 531 F.2d at 80. Similarly, even though the petitioner in Leeson, supra, was accurately informed by

counsel that the statutory maximum for the crime to which he pleaded was 1.3 to 2.6 years imprisonment, the failure to inform him that he could receive an indefinite five-year reformatory sentence rendered his plea unknowing. 496 F.2d at 718. See also United States ex rel. Hill v. Ternullo, supra at 847.

In the instant case, the record of the state court proceedings is devoid of any indication that petitioner Ford was aware of the sentencing consequences of his plea. Furthermore, the record affirmatively demonstrates that at no time, either before or during the taking of the plea, did the trial court inform the petitioner of the statutory maximum for manslaughter in the first degree or robbery in the first degree. The statement made by the petitioner while testifying in the Beasley hearing, prior to sentence, that he was told by his counsel that he would get "no more than 15 years," with "any time" he received to run concurrent and the other two indictments to be dismissed, stands virtually unquestioned and uncontested. (A. 7.)

At the evidentiary hearing, the petitioner reaffirmed his consistent position that his understanding of the consequences of his plea derived solely from two conversations with his counsel, both of which occurred in the bull pen on the day of the pleas. (A. 111-15.) There was no opportunity

for extensive discussions either prior to or during these two conversations. (A. 121-22.) He further testified that the only information which was ever imparted to him by his counsel regarding the maximum for manslaughter in the first degree and the maximum for robbery in the first degree was that he could get no more than fifteen years. (A. 112, 115, 120.) Petitioner maintained this position under cross-examination. (A. 129.)

Petitioner's counsel at the time of the pleas, Noah Braunstein, testified and corroborated petitioner's explanation of the source and nature of his understanding. Essentially petitioner's understanding of the sentence consequences resulted from the manner in which Mr. Braunstein conveyed the result of the plea negotiations. Because Mr. Braunstein believed that he had achieved a package plea with a "bottom line" of fifteen years, he testified that he informed the petitioner the maximum sentence he would receive for his plea to manslaughter in the first degree would be fifteen years. (A. 77-78, 87, 100.) In addition, Mr. Braunstein testified that he never advised the petitioner of the statutory maximum for manslaughter in the first degree or robbery in the first degree, nor informed the petitioner at any time that he could receive a sentence in excess of fifteen years. (A. 104, 106.) Because the only plea discussions which occurred

between the petitioner and defense counsel took place after the initiation of plea negotiations between District Attorney Roberts and Mr. Braunstein on the day of the plea and after the assurance of a recommendation of no more than fifteen years, Mr. Braunstein indicated that he "never had any occasion" to discuss the statutory maximum for manslaughter with the petitioner.¹ (A. 104.)

The District Court, having had the opportunity to observe these witnesses and evaluate their credibility, determined that their testimony was worthy of credit and concluded that the petitioner, at the time of his plea, had no knowledge of the twenty-five year maximum which attached to both his plea to manslaughter in the first degree and his plea to robbery in the first degree. In particular the Court noted that "although [Mr. Braunstein's] memory was somewhat faulty he was ultimately definite about his failure to inform the petitioner of the maximum term to the crime of manslaughter in the first degree."² (A. 146.)

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1. Petitioner was charged in a one-count indictment, which did not include a count of manslaughter as a lesser included offense. (Exhibit 4, Appendix to Petitioner's Memorandum of Law, Submitted to the District Court.)
 2. During the evidentiary hearing, Mr. Braunstein was recalled to the witness stand and questioned by the Court to clarify exactly what sentencing information he had communicated to the petitioner. (A. 102-3.) There was some confusion as to whether a long form indictment

In addition, the District Court found that the petitioner's juvenile record was an insufficient basis from which to infer a knowledge of the statutory penalties for manslaughter or robbery. This conclusion finds substantial support in the record in that petitioner had never before, not as a juvenile nor as an adult, been charged with either manslaughter or robbery. (Petitioner's Motion for Traverse to Opposition, pp. 14-15; A. 39.) Unlike the petitioner in Kelleher, who had been previously convicted and had served prior prison terms as an adult, petitioner Ford had no prior adult convictions and had never served a term in prison. Kelleher v. Henderson, supra, at 80. (Exhibit 4, Appendix to Petitioner's Memorandum of Law, Submitted to the District Court.) Certainly if the court in Kelleher could find that the petitioner therein, despite his prior criminal history, lacked the knowledge of the maximum and minimum terms which

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2. (Cont.) might have entailed a discussion of lesser included offenses, such as manslaughter in the first degree. (A. 97-98.) However the Court did finally ascertain that a one-count indictment was involved and that Mr. Braunstein was clear that he never advised the petitioner of the maximum sentence for manslaughter in the first degree. (A. 104, 106.) Mr. Braunstein returned to the stand after a short recess, during which he had spoken with petitioner's counsel. However the Assistant Attorney General, Mr. McKay, indicated on the record that he did not consider there to have been any improper conduct. (A. 107.)

he faced, the District Court could reasonably conclude in the instant case that petitioner Ford was not informed of the statutory maximums for manslaughter and robbery as a result of being a "'street-wise' youngster." (A. 144.)

B. The District Court Was Correct In Finding that Knowledge of the Sentence Possibilities Would Have Affected Petitioner's Decision to Enter a Plea

This Circuit has isolated a number of factors as critical to the determination of whether accurate sentencing information would have made any difference to a petitioner in his decision to enter a plea, the test articulated in Caputo v. Henderson, supra, at 984. Because "such intangibles as motivation and intent" can only be ascertained by drawing reasonable inferences from objective facts, these factors relate to the known facts and circumstances surrounding the entry of the plea. Id.

In United States v. Welton, supra, the Court looked to the strength of the government's case and the certainty of conviction after trial. 439 F.2d at 826. The Court in Serrano v. United States, 442 F.2d 923 (2d Cir. 1971), considered the independent basis which the petitioner had for a sentence expectation in excess of the mandatory minimum of five years, of which he was unaware. This independent basis was the understanding, arrived at at the time of the

plea, that the government would recommend a sentence of seven years.

Although there was no explicit inquiry into the question of reliance in either Hill or Leeson, supra, the court in Caputo found that "in both Hill and Leeson, there was evidence that the defendants did rely on the erroneous sentencing information . . . " 541 F.2d at 983. The factors to which the court pointed to establish this reliance were the timing of Leeson's request to withdraw his plea--after his plea but before sentencing, the number of occasions on which Hill met with his counsel and discussed the possible sentences which he could receive--twice, and the nature of the misinformation which both Leeson and Hill were given--both were informed by counsel that they faced "at most" a sentence which was actually less than that authorized by statute. Despite the fact that petitioner Hill pleaded guilty to second degree robbery to satisfy two indictments charging him with various counts of robbery, larceny and attempted murder, certainly "a good deal," this court determined that if the petitioner was ignorant of the minimum or maximum sentence possibilities at the time of his plea, his application for a Writ must be granted. 510 F.2d at 844, 846.

Finally, the decision in Kelleher v. Henderson

reiterated most of these factors, as well as introducing a few additional considerations. Petitioner Kelleher was faced with overwhelming evidence against him which consisted of the testimony of the person whom Kelleher was charged with having attempted to murder. As a result, the petitioner himself initiated plea discussions. Although the District Court found that Kelleher had no knowledge of the minimum and maximum terms which he might receive, a prior plea offer of six to eighteen years which he had rejected, a comment by the judge that he faced "a very stiff sentence," and the fact that he had a number of prior convictions gave petitioner the basis for a fairly strong expectation that his sentence would exceed that previously offered.

In direct and distinct contrast to the Kelleher case, the District Court found that petitioner Ford was not anxious to plead, despite his counsel's belief that he was receiving a good deal. (A. 143.) He had witnessed the recantation of the prosecution's key witnesses and had been told by his counsel, on the day of the plea, that "the state's case was falling apart." (A. 111.) Objectively, the damaging effect of this change in testimony is clearly demonstrated by the nature of the prosecution's reaction to it: the arrest and incarceration of both witnesses on perjury charges

and the offer, by District Attorney Roberts, of a plea to a reduced charge. (A. 143.) On the basis of this factual situation, the District Court was clearly justified in concluding that unlike Kelleher and Caputo, the likelihood of conviction was not overwhelming and the petitioner did not feel that a guilty verdict was a certainty.

Other factors, although not explicitly considered by the District Court in its determinations, further distinguish the instant case from both Kelleher and Caputo. In distinct contrast to the facts of both Kelleher and Caputo, petitioner at no time, prior to the plea negotiations between District Attorney Roberts and defense counsel, indicated a desire to take a plea, or even an interest in exploring the possibility. The issue was simply not raised and therefore never discussed by either petitioner or counsel. (A. 61, 111.) In fact, it was the prosecution who initiated plea discussions and first proposed a plea to a reduced charge. (A. 64-65.) Secondly, having been informed by Mr. Braunstein that he would receive no more than fifteen years for his plea to manslaughter in the first degree, with the understanding that his sentence on the robbery charge would run concurrently and that the other indictments would be dismissed, petitioner was provided with no basis for considering a different expectation or even for questioning the

information which he had. There was no prior plea offer, as in Kelleher. At no time did Judge Bloustein make any comment regarding sentence in the petitioner's presence, either to inform him of the statutory minimum and maximum or to indicate any intention to give him a "stiff sentence." At no time did Mr. Braunstein, in his one private meeting with defendant prior to trial or during trial, discuss any other sentence possibilities or any other figure besides fifteen years. (A. 78, 85, 106, 112, 121.) Finally, as in Leeson, petitioner indicated his desire to withdraw his plea as soon as he became aware of the maximum sentences which he could receive, almost immediately subsequent to the plea and prior to sentence, clearly indicating that this was not a case of disappointed expectations or unrealized hopes. (A. 120-22, 143.) At his first opportunity to make his intention known to the court, on the date originally set for sentence, October 31, 1969, petitioner informed the court that he wished to withdraw his pleas. (A. 18-19.) He reiterated his request on November 14, 1969, and on February 9, 1970, when he indicated that he was ready to go to trial on all of the indictments. (A. 14, 40.) Petitioner's immediate and persistent attempts to withdraw his pleas upon learning of the maximums to which he was actually exposed are conclusive evidence of the decisive

impact which the sentence misinformation had on his decision to forego trial and enter a plea.

In light of this factual record, the District Court was clearly not in error when it distinguished this case from Kelleher v. Henderson and determined, according to the dual inquiry mandated by Kelleher, that petitioner did not know and was not advised of the consequences of his plea and that this lack of knowledge affected his ability to enter a knowing and intelligent plea. The conclusion of law which necessarily follows from these factual determinations is that the petitioner's plea was constitutionally defective.

POINT II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING PETITIONER'S APPLICATION FOR A WRIT, BASED ON THE CONSTITUTIONAL INVALIDITY OF HIS GUILTY PLEA

The constitutional theory underlying the law governing guilty pleas was articulated by the United States Supreme Court in McCarthy v. United States, 374 U.S. 459 (1969). The Court reasoned that because a plea of guilty necessarily entails a waiver of a number of constitutional rights, including the defendant's privilege against self-incrimination, his right to a trial by jury, and his right to confront his accusers,

to be valid under the Due Process Clause such a waiver must be knowing and voluntary. Johnson v. Zerbst, 304 U.S. 458 (1938). "Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." McCarthy v. United States, supra, at 466. This Court, in United States ex rel. Leeson v. Damon adopted the rationale of the McCarthy case in the context of the state court guilty plea and concluded that a plea is not knowing and is entered without an understanding of the law where the petitioner is unaware of the maximum possible penalties for the offense to which he is pleading. 496 F.2d at 721. Such a plea, entered in ignorance of its direct consequences, is therefore invalid. See Kercheval v. United States, 274 U.S. 220 (1927).

When a guilty plea is found to have been obtained in violation of the due process clause, courts have consistently held that fundamental fairness requires a defendant to be restored to his original position, by reinstating the not guilty plea and reinvesting the defendant with the fundamental rights which were not knowingly or voluntarily waived. If the defendant should then decide to plead again, his decision would represent a knowing and reasoned choice and his plea would therefore be a constitutionally valid one. United States ex rel. Leeson v. Damon, supra; United States ex rel.

Hill v. Ternullo, supra. See also United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244 (1966).

District Courts are, however, vested with the discretion to grant "other appropriate relief" where they determine such relief to be required. Thus in Leeson, where the petitioner had served more than six and a half years by the time his habeas application was decided by the Court of Appeals, that Court noted that a granting of the Writ might prove inequitable to the petitioner because "the state would presumably be able to bring him to trial on the offense charged, even though he has already served time in the Elmira Reformatory therefor." 496 F.2d at 722. Although the Court of Appeals left the fashioning of appropriate relief to the District Court, the Court did suggest giving the petitioner the sentence that he thought he would receive, 1.3 - 2.6 years, a sentence which would have required his immediate release without further judicial proceedings.

Similarly in Hill, the petitioner had served almost five years at the point that the adjudication of his application for a Writ reached the Court of Appeals. Again the Court left the selection of relief to the District Court on remand. However, in light of the petitioner's asserted understanding that he would receive a maximum of four years, the Court indicated that the Leeson case might be an appropriate

precedent. 510 F.2d at 847. Again this type of remedy would have entailed the petitioner's immediate release, rather than subjecting him to a trial and the possibility of a conviction.

In contrast, in the circumstances of the instant case, the Leeson option is neither an appropriate nor an equitable form of relief. First, fifteen years was not "the sentence he thought he had bargained for." Mosher v. LaVallee, 491 F.2d 1346 (2d Cir. 1974). Respondent places heavy emphasis on this Court's decision in Mosher, whereby the petitioner's sentence was reduced from 40 - 60 years to 15 - 16 years, the sentence which he thought was promised. Unlike the petitioner in Mosher, who believed the Court had agreed to sentence him to the minimum which he could receive for the crime to which he pleaded guilty, 15 - 16 years, petitioner Ford understood the maximum sentence for manslaughter in the first degree to be fifteen years. Petitioner did not necessarily expect to receive the maximum, indicated by his remark at the Beasley hearing, "any time I get would be running concurrent and I would get no more than fifteen years." (A. 7, emphasis added.) In fact, in light of his limited prior criminal history and the complete absence of prior adult convictions, petitioner could reasonably have expected to receive less than the maximum.

Secondly, granting the state the option of sentencing the petitioner to fifteen years imprisonment, in contrast to the situation in both Leeson and Hill, would not burden the petitioner less, but more. Instead of an option of trial, after five to six years, or immediate release, the option suggested for the state in Leeson and Hill, the state in the instant case would be permitted to select a sentence which would require the petitioner to serve up to seven more years in prison, rather than affording the petitioner a trial. In his brief, respondent essentially concedes that the former option, if available, would be the one selected. This Court, in Leeson and Hill, suggested the sentence option based on equitable considerations weighed in favor of the petitioners. The equitable considerations in the instant case clearly weigh against granting such an option to the state.

Thirdly, petitioner has consistently indicated a desire to proceed to trial on all of the indictments, from his first opportunity to make his intentions known to the trial court. During the course of his probation interview, he stated that he desired to withdraw both guilty pleas and to stand trial. (A. 18.) Petitioner reaffirmed this position before the court on October 31, 1969. (A. 19.) During the course of the Beasley hearing on February 9, 1970, he testified that "I'm ready to go to trial on everything. If I blow

it's my life." (A. 14.) Again, in his colloquy with the court prior to sentence, petitioner asserted "I just got through telling you why I want to go to trial to prove I didn't [kill anyone]." (A. 40.) Finally in his pro se Motion for Traverse to Opposition, filed August 28, 1976, petitioner Ford respectfully requested that his petition for a Writ be granted and that he be permitted to withdraw his pleas of guilty. Motion For Traverse To Opposition, p. 17.

In light of the petitioner's reiterated request, over the course of some 7 - 8 years, that he be afforded the opportunity to prove his innocence, it would appear highly inequitable to grant the state the option of forcing him to retain his plea. Not only is the eight year lapse something over which petitioner had no control, as he litigated pro se through the state courts, but in addition it is the petitioner's and not the state's fundamental rights which have been violated. As Justice Douglas maintained in his concurring opinion in Santobello v. New York, 404 U.S. 257, 267 (1971), when a defendant's rights have been infringed, "[i]n choosing a remedy . . . a court ought to accord a defendant's preferences considerable, if not controlling weight . . ."

The preceding discussion clearly establishes that the District Court, in selecting the remedy which it did,

both operated within the bounds of its permissible discretion, and in so doing fashioned the most appropriate and equitable relief in the circumstances of this case.

CONCLUSION

FOR THE REASONS STATED IN POINT ONE, THE CONCLUSION OF THE DISTRICT COURT THAT PETITIONER'S PLEAS WERE UNKNOWNING AND THEREFORE UNCONSTITUTIONAL SHOULD BE AFFIRMED.

FOR THE REASONS STATED IN POINT TWO, THE RELIEF GRANTED BY THE DISTRICT COURT SHOULD NOT BE DISTURBED.

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May 12, 1977

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